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No. 732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

LOCAL UNIONS NOS. 189, 262, 320, 546, 547, 571 AND 638, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL.,
Petitioners,

v.

JEWEL TEA COMPANY, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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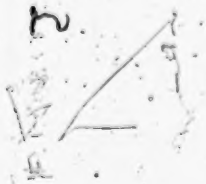

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Local Unions Nos. 189, 262, 320, 546, 547, 571 and 638, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, and their officers and representatives named in the complaint (R. 1, 2, 3-4), pray that a writ of certiorari issue to review the the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on January 11, 1960.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported (*infra*, pp. 1a-11a). The opinion of the District Court is unreported (R. 46-51, 56-58).

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1959 (*infra*, p. 12a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Where the subject matter of a claimed violation of the Sherman Antitrust Act is within the regulatory scope of the National Labor Relations Act, does exclusive primary jurisdiction reside with the National Labor Relations Board?

STATUTES INVOLVED

The pertinent provisions of the Sherman Antitrust Act (26 Stat. 209, 15 U.S.C. § 1), and of the National Labor Relations Act, as amended (61 Stat. 316, 29 U.S.C. § 151), are set forth in Appendix C (*infra*, pp. 13a-16a).

STATEMENT

Jewel Tea Company, Inc., respondent herein, filed a complaint with the United States District Court, Northern District of Illinois, Eastern Division, alleging that petitioners and others violated Sections 1 and 2 of the Sherman Antitrust Act (R. 1). Petitioners moved to dismiss the complaint upon the ground, *inter alia*, that the "alleged restraint is within the exclusive regulatory scope of the National Labor Relations Act and is therefore outside the jurisdiction of the Court" (R.

45.)[1] The District Court denied the motion but entered an order authorizing an immediate appeal, the "court being of the opinion that the orders denying defendants' motion to dismiss and motion to vacate said order involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from these orders will materially advance the ultimate termination of the litigation . . ." (R. 58). The Court of Appeals entered an order allowing the appeal (R. 59; 28 U.S.C. § 1292(b)), and thereafter entered a judgment affirming the denial of the motion to dismiss the complaint (*infra*, p. 12a).

Petitioners are seven local labor unions and named officers and representatives of the local unions (R. 2-4). "The membership of each of these locals consists of many hundreds of butchers or meat cutters who perform substantially all of the cutting and preparation of meat in all retail meat stores in the Chicago area" (R. 3). In addition to petitioners, the complaint names as defendants the Associated Food Retailers of Greater Chicago, a not-for-profit association representing several thousand independent food stores in the Chicago area in collective bargaining, and Charles H. Bromann, secretary and treasurer of Associated (R. 4-5). Associated and Bromann were not parties to the appeal below.

[1] Before the District Court, as before the Court of Appeals, petitioners urged additional grounds for dismissal, namely, that the allegations of the complaint show on their face that: plaintiff is *in pari delicto*; it sustains no injury; the alleged restraint does not affect interstate commerce; it constitutes a reasonable regulation of trade; and the dispute is within the labor exemption of the Sherman Act (R. 45-46). These additional grounds, rejected below, are not presented in this petition; they will be put in issue by the answer and are reserved for trial should that course prove necessary.

Employment terms of butchers and meat cutters in the Chicago area are governed by two different collective bargaining agreements, one known as a "Service Contract" and applicable to "Service Meat Markets," the other known as a "Self-Service Contract" and applicable to "Self-Service Meat Markets" (R. 15, 16-17, 29, 30-31). Respondent is a party to each type of agreement (R. 12). It operates 196 retail food stores in the Chicago area (R. 2), and of the meat departments in those stores, 174 are operated as self-service markets (R. 9), leaving 22 which are operated as service markets. Respondent employs members of petitioner unions to man the meat departments (R. 2).

The service and self-service agreements control the wages, hours, and working conditions of the butchers employed by respondent and other employers in the different markets (R. 15-44). In both agreements, the employer recognizes the union as the exclusive bargaining representative "of all employees in the meat department of said Employer who process, pack, wrap, handle and sell frozen and fresh meats on the Employer's premises . . ." (R. 19, 33). With minor exceptions both agreements require that the work entailed in the preparation and sale of meat shall be performed exclusively by the meat department employees represented by petitioner unions (R. 19-20, 33-34). And both agreements identically define the distinction between a service market and a self-service market (R. 17-18, 31-32):

> *Self-Service and Service.* A self-service market is one in which fresh beef, veal, lamb, mutton or pork are available for sale on a pre-package self-service basis. It is agreed that any market which is operated on a partially service and partially self-service basis shall be classified as a self-

service market if any fresh beef, veal, lamb, mutton or pork are made available for sale on a pre-package self-service basis, even though there is also a service counter offering custom cutting for those who prefer it. Such semi-self-service market shall be considered a self-service market subject to the terms and conditions and wage scale contained in the Self-Service Contract:

"If no fresh beef, veal, lamb, mutton or pork are sold on a self-service basis, then the market is a Service Market and shall be operated in accordance with this Service Contract. It is further expressly understood and agreed that if all fresh beef, veal, lamb, mutton and pork sold by a market are handled and sold on a service basis only, the fact that a market handles and sells on a self-service basis, delicatessen and other meat products now excepted from the jurisdiction of the Union under this Service Contract shall not operate to classify such market as a self-service market; but such semi-self-service market shall nevertheless be considered a service market subject only to the wage scales, hours and other conditions provided in the Service Contract."

The agreements establish the same "Basic Workday" in both service and self-service markets (R. 22, 36):

Eight (8) hours shall constitute the basic workday, Monday through Saturday; work to begin at 9:00 a.m. and stop at 6:00 p.m., allowing one hour for lunch, said hour to begin no earlier than 11:00 a.m. nor end later than 2:00 p.m. This is to apply to all markets whether manned by one or more than one employee.

The counterpart of the "Basic Workday" is the provision in the agreements defining the "Market Operating

Hours" in both service and self-service market (R. 23-24; 38):

> Market operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive. No customer shall be served who comes into the market before or after the hours set forth above.

The heart of the complaint is its challenge to the validity of the latter provision defining "Market Operating Hours." The complaint alleges that, "Beginning at least 10 years ago and continuing thenceforth," petitioner unions, in combination with Associated, have conspired to restrict the retail sale of fresh meat in the Chicago area to the 54 hour span from 9:00 a.m. to 6:00 p.m., Monday through Saturday. (R. 9-10). The complaint avers a "widespread public demand in the Chicago area that meat be available for retail purchase at [respondent] Jewel stores during one or more evenings of the week" (R. 8), and that, but for the limitation of retail marketing hours to the daytime, respondent "would vend meats in all or most" of its 174 self-service markets "one or more evenings a week . . ." (R. 9). The complaint alleges that, in a self-service market, meat to be sold after 6:00 p.m. can be prepared and packaged by butchers before 6:00 p.m., and that the "tasks of arranging the cuts in the cases and cleaning the cases need not be performed continuously throughout store hours and can be performed by others or can be performed by butchers some hours prior to the ending of store hours" (R. 7).

The complaint alleges that "For many years past," in order to achieve the objective of confining market operating hours to the daytime, petitioner "unions, . . . conspiring together with Associated, . . . have insisted that all collective bargaining agreements entered

into between the unions and operators of retail meat markets in the Chicago area be identical, and have insisted that the bargaining between all such operators (or their representatives) and the unions be carried on simultaneously and have exercised their monopoly powers to effectuate that insistence" (R. 10-11). "For many years past," the complaint continues, petitioners and Associated "have insisted" that "contracts between defendant unions and all operators of retail meat markets contain provisions prohibiting the retail sale of meat after 6:00 p.m. and have exercise the union's monopoly powers to effectuate that insistence" (R. 11).

With specific reference to the agreements entered into in early 1958, the complaint alleges that in 1957, in anticipation of the expiration of collective bargaining agreements on October 5, 1957, petitioner unions and operators of retail meat markets, including respondent, met "for the purpose of negotiating new agreements" (R. 11); the provision pertaining to market operating hours was in issue in the negotiations (R. 11); the "unions threatened to strike and picket any operator who refused to sign a contract which banned evening sales of meats," a "strike . . . threat made with the authorization of members of the several unions . . ." (R. 11); had such a strike or picketing ensued "other unions . . . would have honored such picket lines" (R. 12); under this "compulsion" respondent entered into agreements in early 1958 containing the marketing hours provision (R. 12); and after execution of the agreements, petitioner unions made "a strike threat" to secure compliance with the provision (R. 12-13).[2]

[2] These agreements, effective October 6, 1957, were to run until October 3, 1958, and from year to year thereafter, unless terminated by written notice given not less than sixty days prior to

The relief requested by the complaint is, *inter alia* that the limitation upon marketing hours "be declared illegal, null and void," that its enforcement be enjoined, and that petitioner unions be restrained from "striking, or picketing for the purpose of restricting plaintiff's hours of operation" (R. 14).

The Court of Appeals concluded that the subject of the complaint was outside the regulatory scope of the National Labor Relations Act. It telescoped petitioners' position in two sentences (*infra*, p. 5a):

> The core of appellants' position in their motion to dismiss is that "the provisions pertaining to market operating hours and the basic work day are opposite sides of the same coin," since, as they assert, a change in one automatically affects the other. And because one side of this coin, hours of employment, is governed by the National Labor Relations Act, *ipso facto* the reverse side is also within the exclusive regulatory scope of that act.

The court then stated that the establishment of marketing hours is an "inherent" management function within the employer's "exclusive right to determine" (*infra*, p. 5a):

> Determining the needs of the public and meeting those needs are inherent proprietary rights and obligations of the employer and must be clearly distinguished from his rights and duties as master

each expiration date (R. 27-28, 44). Before rendition of the decision below, new agreements containing the marketing hours provision had been reached between petitioner unions and market operators, including respondent; these new agreements, effective October 4, 1959, run until October 7, 1961, and from year to year thereafter, unless terminated by written notice given not less than sixty days prior to each expiration date. Since rendition of the decision below, respondent has delayed execution of the agreements previously reached.

> in the master and servant relationship. Setting marketing hours is one such proprietary function which an employer has the exclusive right to determine as dictated by economic factors present within his trading area.

The court concluded that marketing hours and working hours are so unrelated to each other that a connection between the two "can hardly be argued" (*infra*, p. 7a):

> Although exercise of an employer's proprietary right to establish marketing hours may incidentally affect its employees, as will almost anything it does, it can hardly be argued that such action is a "direct frontal attack" upon or even a "remote and indirect approach" to the subject of the basic work day.

REASONS FOR GRANTING THE WRIT

Central to the question presented is accommodation of the jurisdiction of the National Labor Relations Board to administer the National Labor Relations Act with the jurisdiction of a federal district court to enforce the Sherman Antitrust Act. More specifically, where the subject matter of a claimed violation of the Sherman Act is within the regulatory scope of the National Labor Relations Act, does exclusive primary jurisdiction reside with the National Labor Relations Board?

1. Analysis begins with a showing that the subject of the complaint is within the regulatory scope of the National Labor Relations Act. In the properly limited compass of a petition analysis must necessarily be abbreviated, but even a synopsis suffices to show that the allegations of the complaint critically implicate activity protected or prohibited by the National Labor Relations Act.

(a) The complaint attacks as an antitrust violation the contractual requirement that retail marketing hours shall cease at 6:00 p.m. The exact counterpart of this limitation is the contractual requirement that the workday shall cease at 6:00 p.m. The two march abreast of each other to guarantee effective accomplishment of the butchers' wish not to work after 6:00 p.m.

Marketing hours are thus integrally related to working hours, and "hours of employment" is a subject upon which the National Labor Relations Act requires employers and unions to bargain collectively. Thus, the policy of that Act is based on "encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to . . . *hours* . . ." (Sec. 1, ¶4). The status of a union as the exclusive representative of the employees empowers it to bargain "in respect to . . . *hours of employment* . . ." (Sec. 9(a)). The reciprocal obligation of employers and unions to bargain with each other (Secs. 8(a)(5), 8(b)(3)) extends explicitly to "hours" (Sec. 8(d)). The mediation facilities provided by the Government are designed to "aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning . . . *hours*" (Sec. 201(b), and employers and unions are adjured to "exert every reasonable effort" to that end (Sec. 204(a)(1)).

As an essential part of working hours, marketing hours is thus within the area of activity for which collective bargaining is ordained.

(b) To escape the relevance of marketing hours to working hours, the complaint alleges that, *in a self-service market*, meat to be sold after 6:00 p.m. can be prepared and packaged by butchers before 6:00 p.m., and that the "tasks of arranging the cuts in the cases and cleaning the cases need not be performed contin-

nously throughout store hours and can be performed by others *or* can be performed by butchers some hours prior to the ending of store hours" (R. 7, emphasis supplied). Consideration of either alternative confirms the governance of the subject by the National Labor Relations Act.

(*i*). The work that the complaint asserts "can be performed by others" is butchers' work. The complaint admits that in a self-service meat department part of the work done by butchers, in addition to cutting and packaging meat, is "to place the prepared cuts in display cases and to keep the cases clean and orderly" (R. 7). The self-service contract provides that petitioner unions are the exclusive bargaining representatives of all meat department employees "who process, pack, wrap, *handle and sell* frozen and fresh meats . . ." (R. 33, emphasis supplied). Meat department employees, it further provides, "shall perform *all* cutting, preparing, fabricating, *handling,* and packaging," and they shall have "*exclusive jurisdiction* over . . . *sale* . . ." (R. 33-34, emphasis supplied).

This the complaint would satisfy the butchers' wish not to work after 6:00 p.m. by taking the work from them. But the butchers' concern is plainly twofold: *not* to work evenings and *not* to have the work taken from them. And who shall do the work is a subject of collective bargaining. The contracts here place the work exclusively within the jurisdiction of the meat department employees. To permit employees outside the meat department to do the work within it takes the work away from the meat department employees. A union may, as the National Labor Relations Board holds, strike to compel an employer to honor the work assignment embodied in the collective bargaining agree-

ment.[3] It is thus no solution to the butchers' objection to working later than 6:00 p.m. to operate the meat department after 6:00 p.m. with other than meat department employees doing the work.

(*ii*) The other alternative asserted in the complaint is that, *in a self-service market*, all the work entailed in the operation of a meat department after 6:00 p.m. "can be performed by butchers some hours prior to the ending of store hours" (R. 7). The alternative that a *self-service* meat department may be operated after 6:00 p.m. with *no* employees on duty ignores the relationship of the service to the self-service markets. Meat can be sold in a *service* market *only* when butchers are on duty. To permit meat to be sold after 6:00 p.m. in a self-service market, but to maintain marketing and working hours in the service market to 6:00 p.m., would mean, as respondent admits (R. 55), that a portion of the trade that would otherwise patronize the service market would inevitably be siphoned off to the self-service market. This would mean a loss of work for butchers employed in the service market. To prevent this—to safeguard the work of butchers in service markets—the petitioner unions would have to permit them to work evenings. This would destroy the limitation on hours of work. In short, because of the competitive position of service and self-service markets, in order to maintain the hours of work limitation and to prevent loss of work by one type of market to the other based on differences in marketing hours, it is necessary that

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[3] *National Ass'n. of Broadcast Engineers*, 105 NLRB 355, 363-365; *Radio & Television Broadcast Engineers Union*, 114 NLRB 1354, 1359; *Local No. 48, Sheet Metal Workers*, 119 NLRB 287, 291; *Local 181, International Union of Operating Engineers*, 121 NLRB 1076; *Local 153, Wood, Wire & Metal Lathers Union*, 121 NLRB 1107, 1108, 1109, n. 37.

the marketing hours be kept the same in both types of stores. And collective bargaining under the National Labor Relations Act contemplates that a valid aim for both employers and unions alike is "avoiding the competitive disadvantages resulting from nonuniform contractual terms." *National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96.

Furthermore, to operate the self-service meat department after 6:00 p.m. by performing the work before 6:00 p.m. can only be done by increasing the existing pre-6:00 p.m. work load of butchers. Work load is a subject of mandatory collective bargaining.[1] Limiting market operating hours to 6:00 p.m. fulfills the petitioner unions' proper interest in not increasing the existing work load.

(c) It is thus evident upon the face of the complaint that its allegations raise matters the determination of which requires decision of questions fundamental to the National Labor Relations Act. And the face of the complaint does not exhaust the considerations relevant to the application of the doctrine of primary jurisdiction. As this Court has explained (*United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U.S. 474, 487):

> In the first place, while the allegations of the bill must be taken as true upon the motion to dismiss, they still are subject to challenge by pleading and proof if the motion be denied. We cannot assume that, in a proceeding before the board in which the whole case would be open, similar allegations will not be denied or met by countervailing affirmative averments. . . . And whatever may be the form of the agreement, and whether it be lawful

[1] *Beacon Piece Dyeing & Finishing Co.*, 121 NLRB 953; *Woodside Cotton Mills Co.*, 21 NLRB 42, 54-55.

or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter."

Upon a trial, among other things, petitioners would show that in the Chicago area limitations upon retail hours in the marketing of meat have been included in collective bargaining agreements since 1920, and that respondent has been a party to such agreements since about 1928; that the limitation has its origin in the desire of butchers to shorten the working day and to keep from working evening hours, and that it continues for that purpose; that it is not possible to operate a meat department evenings without butchers on duty, and that an extension of marketing hours inescapably embraces an extension of working hours; and that in the 1957-1958 negotiations respondent's request for evening marketing hours was explicitly coupled with a request that butchers work evenings.

(d) Marketing hours is thus a mandatory subject of collective bargaining because of its relationship to working hours and protection of work. As such, the inclusion in a collective bargaining agreement of a provision regulating marketing hours "is an issue for determination across the bargaining table" (*National Labor Relations Board* v. *American National Ins. Co.*, 343 U.S. 395, 409); and the Government is not to "sit in judgment upon the substantive terms of collective bargaining agreements" (*id.* at 404). "Within the area in which collective bargaining was required, . . . the parties . . . are to work out their agreement themselves." *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283, 295. "The Act does not fix and does not authorize anyone to fix generally applicable standards of working conditions." *Terminal*

Railroad Ass'n. v *Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6. Nor is it the office of the antitrust laws to excise from the area of collective bargaining subjects which the National Labor Relations Act commits to that area.

But even if marketing hours is not a mandatory subject of collective bargaining, it is nonetheless within the regulatory scope of the National Labor Relations Act. The complaint alleges that petitioners "have insisted" upon the marketing hours provision in collective bargaining (R. 11). To insist upon a nonmandatory subject is to refuse to bargain, for "it is lawful to insist upon matters within the scope of mandatory bargaining *and unlawful to insist upon matters without*, . . ." *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (emphasis supplied). The order which ensues would require cessation from that insistence (*Wooster Division of Borg-Warner Corp.*, 113 NLRB 1288, 1297, affirmed, 356 U.S. 342), as well as from auxiliary conduct designed to effectuate it (*International Longshoremen's Association*, 118 NLRB 1481, 1483, remanded, 45 LRRM 2551 (C.A.D.C., Jan. 28, 1960)).

And whether or not marketing hours is a mandatory or permissive subject of collective bargaining requires initial determination by the National Labor Relations Board. The complaint prays that "the restriction on hours . . . be declared illegal, null and void, and that defendants be enjoined from enforcing said restriction in [the collective bargaining agreements] . . . or any other rule, contract, or restriction having a similar effect or purpose" (R. 14). Were the Board to find that marketing hours is a mandatory subject of negotiation, it would require petitioners and respondent to

bargain with each other on the subject should either refuse to do so. Thus the complaint asks the District Court to enjoin as a violation of the Sherman Act what the Board may compel as a duty under the National Labor Relations Act. This is an impossibility. A principal function of the doctrine of primary jurisdiction is to avoid just such "uncoordinated and conflicting requirements." 3 Davis, Admin. Law Treatise, § 19.01, p. 5 (1958). "Otherwise, we might have the spectacle of courts throughout the country enjoining practices as violations of the antitrust laws even though the agency specifically authorized to deal with them has determined or may decide, subject to judicial review, that such practices serve the interests" of the regulatory policy committed to the agency's administration. *S.S.W., Inc.* v. *Air Transport Ass'n. of America*, 191 F. 2d 658, 663 (C.A.D.C.). See also, von Mehren, *The Antitrust Laws And Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 Harv. L. Rev. 929, 965-966 (1954).

(e) The inclusion of the subject matter of the complaint within the regulatory scope of the National Labor Relations Act is emphasized by the means asserted to effectuate the alleged conspiracy. The complaint avers that petitioners "have insisted that all collective bargaining agreements entered into between the unions and operators of retail meat markets in the Chicago area be identical, and have insisted that the bargaining between all such operators (or their representatives) and the unions be carried on simultaneously and have exercised their monopoly powers to effectuate that insistence" (R. 10-11). These alleged means graphically illustrate the deep embedment of the whole of the subject within the regulatory scope of the National Labor Relations Act.

First, to assert that the petitioner unions "exercised their monopoly powers" is simply an epithetical advertence to the right to strike. But the "Strike threat . . ., together with the occasional strike itself, is the force depended up to facilitate arriving at satisfactory settlements.'" *National Labor Relations Board* v. *Lion Oil Co.*, 352 U.S. 282, 291.

Second, insistence that "all collective bargaining agreements . . . be identical" is insistence upon nothing but uniformity in labor standards, a traditional and legitimate labor objective. Indeed, "avoiding the competitive disadvantages resulting from nonuniform contractual terms" is so valid an aim that employers may lawfully engage in a "temporary lockout to preserve the multi-employer bargaining basis from the disintegration threatened by the Union's strike action" against one employer alone. *National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96, 97.

Third, the allegation of insistence upon simultaneous negotiation among petitioners and all operators of meat markets ultimately presents the question of the appropriate structure for bargaining. Employers and unions have the statutory bargaining obligation "to meet at reasonable times and confer in good faith . . ." (Secs. 8(d), 8(b)(3)). Insistence upon simultaneous negotiation may well fulfill the duty "to meet at reasonable times and confer in good faith" if the respondent is part of a multi-employer bargaining group; it may well not do so if respondent is bargaining on a single-employer basis. Whether it is one or the other basis depends upon whether the structure for bargaining is the single-employer unit or multi-employer unit, a

question committed to the Board's determination. See *Retail Associates, Inc.*, 120 NLRB 388.

2. Since the subject matter of the complaint is within the regulatory scope of the National Labor Relations Act, the same rationale which preempts state action compels application of the doctrine of primary jurisdiction.

Had the instant complaint been filed in a state court alleging a violation of a state antitrust statute, dismissal of the complaint in deference to the exclusive jurisdiction of the National Labor Relations Board would be required. That is the teaching of this Court's decisions last term in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, and *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283. *Garmon* teaches that where activity is *arguably* subject to the protection of Section 7 or the prohibition of Section 8 of the National Labor Relations Act, exclusive competence to decide the question resides with the National Labor Relations Board. *Oliver* teaches that state prohibition is excluded "'even though that with which the federal law is concerned as a matter of labor relations be related by the State to the more inclusive area of restraint of trade'" (358 U.S. at 297).

The rationale which requires a state court to defer to the jurisdiction of the National Labor Relations Board applies equally to a federal court. *Garmon* itself states that "When an activity is arguably subject to § 7 or § 8 of the Act, the States *as well as the federal courts* must defer to the exclusive competence of the National Labor Relations Board . . ." (359 U.S. at 245, emphasis supplied). This has long been settled; indeed, the original displacement of the state courts was

based on the fact that not even a federal court could act. "The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so. * * * And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal Board also exclude state courts from like action." *Garner* v. *Teamsters Union*, 346 U.S. 485, 491. See also, *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468, 479 and n. 8; *Acme Freight Lines, Inc.* v. *Clayton*, 228 F. 2d 385, 389 (C.A. 2), cert. denied, 351 U.S. 950. For action by a federal court, no less than by any other tribunal, creates "potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, . . . of inconsistent standards of substantive law and differing remedial schemes" (359 U.S. at 242).

Nor does it make a difference that the source of law invoked in the federal court is the Sherman Antitrust Act. The provision of the collective bargaining agreement at issue in *Oliver* pertained to minimum equipment rental of leased vehicles. The Court found the provision to be a mandatory subject of collective bargaining because it was designed to maintain the "basic wage structure established by the collective bargaining agreement" and to prevent "progressive curtailment of jobs" (358 U.S. at 293-294). While the provision in *Oliver* was attacked via *state* antitrust law, whereas the provision here is attacked via *federal* antitrust law, the difference in the source of the attack cannot alter the containment of the subject within the scope of mandatory collective bargaining. Whether it is within this scope depends solely upon whether it "is a sub-

ject within the phrase 'wages, hours, and other terms and conditions of employment' which defines mandatory bargaining." *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349. It is evident that the minimum equipment rental provision in *Oliver* would not be any the less a subject of mandatory collective bargaining had the suit been instituted in a federal district court based on the federal antitrust laws rather than in an Ohio court based on the state antitrust laws. And the same must be true of the retail marketing hours provision in this case.

To be sure, in *Oliver*, the Court stated that "federal law sets some outside limits (not contended to be exceeded here) on what their [the union's and employer's] agreement may provide, see *Allen Bradley Co.* v. *Local Union*, 325 U.S. 797; cf. *United States* v. *Employing Plasterers Ass'n.*, 347 U.S. 186, 190." 358 U.S. at 296. But the condemned aspects of the agreements in *Allen Bradley* and *Plasterers* pertained to compacts among business men to exclude competitors from the market. These were trade restraints effectuated by a combination of business men, aided by a union, in which the activity did not directly serve a collective bargaining objective and was related to wages and work *only* in the sense that the greater profits realized because of the activity enabled the employers to pay better wages and provide more work. The National Labor Relations Act does not require bargaining on a proposal to exclude competitors from the market or to fix prices on the theory that diminution in competition will make the companies more prosperous and thus enable them to increase wages. But in this case, as in *Oliver*, the agreement pertains directly to a collective bargaining subject, and here, as there, the National Labor Rela-

tions Act controls. "At the least the subject of the agreement is surely arguably within the regulatory scope of the National Labor Relations Act and hence the National Labor Relations Board alone is empowered to determine the question in the first instance. Prior resort to the Board is especially appropriate because the Sherman Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212, n. 7.

The principles underlying the preemption of state action thus control here as well. As has been observed, "even though the thinking about" preemption in the context of the National Labor Relations Act "has focused upon the problem of federalism, the problem still continues to be one of primary jurisdiction. When relief is sought in a federal court instead of in a state court, the problem of whether the court should defer to the Board is much the same." 3 Davis, Admin. Law Treatise, § 19.05, p. 23 (1958). "The principal reason behind the doctrine [of primary jurisdiction] is recognition of the need for orderly and sensible coordination of the work of agencies and of courts." *Id.* at 5. ". . . [B]efore the particular agency has defined the particular regulatory policy in the particular case, the courts are not well equipped to make initial decisions involving accommodation of the antitrust policy to the regulatory policy." *Id.* at 25. And so, "A court should not act without knowing the agency's specific regulatory policy with respect to the particular problem in the particular circumstances." *Id.* at 27.

But the court below disdained "taking into account what the agency has to offer. . . ." *Id.* at 5. It concluded that marketing hours and working hours are so unrelated that a connection between the two "can hardly be argued . . ." (*infra*, p. 7a). Solely upon the basis of this bare *ipse dixit* it not only bypassed the National Labor Relations Board but decided an important question of the scope and specific application of the National Labor Relations Act altogether abstractly. Without any exploration of what the complaint shows on its face, much less any consideration of what a factual inquiry into the particular circumstances would independently disclose, the court below removed marketing hours from the bargaining table by enunciating the dogma that "an employer has the exclusive right to determine" marketing hours as an exercise of "inherent proprietary rights" (*infra*, p. 5a).[5] Such "abstract exposition" uninformed by the agency's judgment is the antithesis of the doctrine of primary jurisdiction and a renunciation of its values. *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 499. As with the Civil Aeronautics Act, so with the National Labor Relations Act, "proceedings before the Board will result in a determination by it of the extent of its jurisdiction over the subject matter. In addition, they will produce a record, findings of fact and conclusions of law as to whether the specific practices complained of are legal or illegal under the . . . Act—all of which

[5] The same absolutist dichotomy between things managerial and things labor—highlighted by the anachronistic advertence to the employer's role "as master in the master and servant relationship" (*infra*, p. 5a)—is reflected in the decision of the court below in *Order of Railroad Telegraphers* v. *Chicago and North Western Ry. Co.*, 264 F. 2d 254, certiorari granted, No. 100, October Term 1959, Oct. 12, 1959.

will be subject to judicial review under that Act." *S.S.W., Inc.* v. *Air Transport Ass'n. of America*, 191 F. 2d 658, 664 (C.A.D.C.). Without such prior recourse responsible accommodation of antitrust policy with regulatory policy cannot be achieved.

3. To decline or defer jurisdiction of an alleged violation of the Sherman Antitrust Act in favor of an agency's determination of cognate questions under a regulatory statute is of course not new doctrine. Recourse to the agency has been required under the Interstate Commerce Act,[6] the Shipping Act,[7] and the Civil Aeronautics Act.[8] And while it was not required under the Communications Act in its regulation of the television industry,[9] this Court stressed the applicability of the doctrine of primary jurisdiction to situations in which "administrative uniformity" and "administrative experience" were requisite.[10] These considerations are decisive here. Under the National Labor Relations Act, "Congress has expressed its judgment in favor of uniformity." (*Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 10-11), and the "unifying consideration" of this Court's "decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative

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[6] *United States* v. *P. & R. Ry. & Nav. Co.*, 228 U.S. 87, 406-408; *Keogh* v. *Chi. & N.W. Ry. Co.*, 260 U.S. 156; cf., *United States* v. *West. P. R.R. Co.*, 352 U.S. 59.

[7] *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U.S. 570; *Far East Conference* v. *United States*, 342 U.S. 570; cf. *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 496-500.

[8] *S.S.W., Inc.* v. *Air Transport Ass'n. of America*, 191 F. 2d 658 (C.A.D.C.).

[9] *United States* v. *Radio Corp. of Amer.*, 358 U.S. 334.

[10] *Id.* at 347-348.

agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience" (*San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 242). Whether the doctrine of primary jurisdiction should apply to claimed violations of the Sherman Antitrust Act which are within the regulatory scope of the National Labor Relations Act is a question of fundamental importance which this Court should decide.

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 1960.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12653 SEPTEMBER TERM, 1959—JANUARY SESSION, 1960.

JEWEL TEA COMPANY, INC., a New York corporation,
Plaintiff-Appellee,

v.

LOCAL UNIONS NOS. 189, 262, 320, 546, 547, 571 and 638, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

January 11, 1960.

Before DUFFY and SCHNACKENBERG, *Circuit Judges*, and PLATT, *District Judge*.

SCHNACKENBERG, *Circuit Judge*. Appellee, plaintiff below, is Jewel Tea Company, Inc. (herein called Jewel), a New York corporation operating 196 retail stores in and around the Chicago area, including four stores in northwestern Indiana. Defendants, Local Unions Nos. 189, 262, 320, 546, 547, 571 and 638 of Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (herein sometimes referred to as unions), Earl Saltow, Frank Fox, Earl Heinz, Harold L. Rosa, George Flosi, Lester Ferguson, Fred Clavio, Alex M. Nielubowski, Thomas F. Gorman, R. Emmett Kelly, Mark Cantrell, Casimir Walczak, Stanley Brodzinski and William A. Stepan, officers and representatives of said unions, appeal from orders denying, and adhering to the denial, a motion to dismiss Jewel's complaint alleging a violation of

§§ 1 and 2 of the Sherman Antitrust Act.[1] The court below entered an order authorizing an immediate appeal.[2] Also named as defendants, but not parties to the appeal, are Associated Food Retailers of Greater Chicago, Inc., an Illinois corporation (herein referred to as Associated), a not-for-profit trade association representing several thousand individual or independent food stores engaged in the retail sale of meat in the Greater Chicago area, and Charles H. Bromann, secretary and treasurer of Associated.

The complaint alleges that there are approximately 9,000 retail food stores in the Chicago area which sell meats, fish and poultry; their annual sales of such products exceed $5,000,000,000. Substantial portions of the meats and allied products so sold are acquired from without Illinois or acquired from suppliers in Illinois who have purchased said meats from out-of-state sources for resale to meat distributors, wholesalers and retail food stores in the Chicago area. Approximately 77.5% of such products retailed by plaintiff originate outside Illinois. Plaintiff's sales of meats, poultry, fish and similar items customarily sold in meat markets were approximately $85,000,000 in 1957.

Final preparation of the meats for sale to the public is generally performed by the retail meat markets themselves which employ and supervise members of defendant unions who perform this work. Jewel has introduced a "pre-packaged, self-service" system in approximately 174 of its stores, whereby the meat is cut, trimmed and wrapped in sanitary, transparent, cellophane packages in advance of sale. Under this system customers are able to purchase meat without waiting for services of a butcher, and butchers are able to prepare the meats without

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[1] 15 U.S.C.A. §§ 1, 2.

[2] 28 U.S.C.A. § 1292 (b).

customer interruptions. Because of modern refrigeration equipment installed by plaintiff, prepackaged meats can be sold during evening hours without a butcher in attendance.

The complaint further alleges that in the Chicago area there is a widespread demand that meat be available for retail purchase one or more evenings a week since in many households both husband and wife work during daytime hours or the family automobile is available for marketing only in the evening. Plaintiff would so provide convenient evening hours for sale of its meats except for an alleged conspiracy, which is the subject matter of this suit.

It is alleged that beginning ten years ago and continuing thenceforth, defendants have engaged in an unlawful combination and conspiracy to suppress competition among retail meat markets in the Chicago area and wholly to prevent the sale of meats and meat products before 9 A.M. or after 6 P.M. Mondays through Saturdays. In furtherance of this alleged combination or conspiracy, the defendants entered into an agreement, the substantial terms of which, according to the complaint, are that they agreed

"(a) That no person or firm be permitted to engage in the retail sale of fresh beef, veal, lamb, mutton, or pork before 9:00 A.M. or after 6:00 P.M.

(b) That defendant locals and their officials and representatives named herein refuse to allow members of their organization to sell fresh beef, veal, lamb, mutton or pork at retail before 9:00 A.M. or after 6:00 P.M.

(c) That no person or firm be permitted to sell fresh beef, veal, lamb, mutton or pork at retail before 9 A.M. or after 6:00 P.M. with or without the em-

ployment of members of defendant unions outside those hours.

(d) The co-conspirator members of defendant Associated have agreed among themselves to insist that all collective bargaining agreements entered into between them and defendant unions or between defendant unions and plaintiff or other operators of food stores shall contain provisions prohibiting the sale at retail of fresh beef, veal, lamb, mutton or pork before 9:00 A.M. and after 6:00 P.M.

(e) Associated, its members and officers have conspired and agreed with the other defendants that neither plaintiff nor any other merchandiser is to be permitted to compete lawfully with them by operating self-service meat markets between the hours of 6:00 P.M. and 9:00 P.M.

(f) That defendant unions, their officers and members have acted as the enforcing agent of the conspiracy."

Under compulsion of the alleged conspiracy and the threat of strike by the unions, plaintiff asserts that it was forced to sign in late January and early February 1958 contracts with defendant unions containing the following restriction:

> "Market operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive. No customer shall be served who comes into the market before or after the hours set forth above."[3]

[3] This provision appears in each of two different collective bargaining agreements, one known as a "Service Contract" and applicable to "Service Meat Markets," the other known as a "Self-Service Contract" and applicable to "Self-Service Meat Markets." Each agreement effective October 6, 1957, runs until October 3, 1959, and from year to year thereafter, unless terminated by written notice given not less than 60 days prior to each expiration date.

The remaining provisions of the collective bargaining contracts concern hours, wages and conditions of employment.

1. The core of appellants' position in their motion to dismiss is that "the provisions pertaining to market operating hours and the basic work day are opposite sides of the same coin," since, as they assert, a change in one automatically affects the other. And because one side of this coin, hours of employment, is governed by the National Labor Relations Act, *ipso facto* the reverse side is also within the exclusive regulatory scope of that act. Not only is the conclusion fallacious, but also the basic premise from which it is derived. An employer has the right and it is his duty, if he is to survive commercially, first to determine the needs of the public, second to provide a time, a place and facilities for meeting those needs, and third to provide, under the terms of the National Labor Relations Act, the services of employees to accomplish the foregoing objectives. The rights of labor attach only to the third, and if any effort is made by labor to infringe rights of the employer in the first or second field, it is not shielded from the sword of the antitrust laws. Determining the needs of the public and meeting those needs are inherent proprietary rights and obligations of the employer and must be clearly distinguished from his rights and duties as master in the master and servant relationship. Setting marketing hours is one such proprietary function which an employer has the exclusive right to determine as dictated by economic factors present within his trading area.

Facts set forth in the complaint show a "widespread public demand in the Chicago area that meat be available for retail purchase at Jewel stores during one or more evenings of the week." Plaintiff has an untrammeled right to determine its course of action in respect to this matter.

Whether one system of marketing or another offers the greater good and better prices in any given commu-

nity is to be determined by the public: the laws of free competition may not be thwarted by a combination of employers and unions who conspire to prevent commercial development.

Appellants rely on *Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959), to sustain their argument that market operating hours are so intimately connected with hours of employment that the two cannot be divorced. In that case several local unions entered into a collective bargaining agreement with a group of interstate motor carriers providing for regulation of rental fees and wages paid to owner-drivers of vehicles leased to the carriers. The court held that the leasing of these vehicles was a matter of collective bargaining, but carefully qualified this holding by stating, at 293:

> The text of the Article [agreement] and its unchallenged history show that its objective is to protect the negotiated wage scale against the possible undermining through diminution of the owner's wages for driving which might result from a rental which did not cover his operating costs. This is thus but an instance, as this Court said of a somewhat similar union demand in another case, in which a union seeks to protect lawful employee interests against what is believed, rightly or wrongly, to be a "scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards." *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91, 98-99 * * *. The regulations embody not the "remote and indirect approach to the subject of wages" * * * but a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract.

Although exercise of an employer's proprietary right to establish marketing hours may incidentally affect its employees, as will almost anything it does, it can hardly be argued that such action is a "direct frontal attack" upon or even a "remote and indirect approach" to the subject of the basic work day. It is conceivable that maintenance of meat markets during evening hours will create even more jobs for union employees.

2. Appellants next assert that an agreement pertaining to market operating hours is exempt from the antitrust laws since it was entered into in the self-interest of the employees to attain or maintain conditions deemed by the union relevant to the employees' working welfare. *United States v. Hutcheson*, 312 U. S. 219 (1941). However, appellants recognize that *Allen Bradley Co. v. Local Union No. 3, IBEW*, 325 U.S. 797 (1945), qualifies this exemption. The Supreme Court there stated, at 808-810:

> "* * * Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and *to control the marketing of goods and services.*
>
> Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. (Emphasis supplied.)"

The complaint states that defendant Associated is a trade association consisting of "several thousand individual or independent food stores engaged in the retail sale of meat for human consumption in the Greater Chicago area." The complaint further states that for many years past defendant Associated and its co-conspirator members and Bromann and the defendant unions, their officers and members, have insisted, despite public

demand and interest to the contrary, that contracts between defendant unions and all operators of retail meat markets contain provisions prohibiting the retail sale of meat after 6 P.M. and have exercised the unions' monopoly powers to effectuate that insistence.

The operation of this agreement has enabled Associated stores to remain closed after 6 P.M. without fear of losing trade to plaintiff, a major competitor, because of evening sales, and also to avoid the added expense of remaining open during the evening. Any attempt to clothe the alleged conspiracy with a robe of propriety by making the union a co-conspirator is to make the latter a vehicle for exempting an otherwise unlawful activity from the sweep of the Sherman Act. This the antitrust laws will not condone.[4]

3. To establish a violation of the Sherman Act the alleged contract, combination or conspiracy must be "in restraint of trade or commerce *among the several States* * * *." (15 U.S.C.A. § 1, emphasis supplied.) Appellants admit that the complaint sufficiently alleges the interstate flow of meats into the Chicago market, but assert that failure to allege diminution of this inflow is fatal to plaintiff's cause of action, since the retail trade of meats over the counter is purely a "local intrastate activity" which cannot in and of itself adversely affect interstate commerce. The complaint avers that the effects of the alleged unlawful agreement to limit marketing hours to 9 A.M. to 6 P.M. has been to restrain the flow of interstate trade and commerce of meats and meat products, and to maintain the price of retail meats above what they would otherwise be. In accordance with *United States v. Employing Plasterers Ass'n.*, 347 U.S. 186, 189 (1954), we hold that the complaint properly charges a restraint of

[4] Associated and Bromat n have entrusted their interests in the defense of this suit to counsel for the unions. They formally adopted by reference the latter's motions and briefs.

interstate commerce, and that plaintiff should be given an opportunity to introduce evidence to prove that these local restraints unreasonably burden the free and uninterrupted flow of meats into the Chicago market. "That wholly local business restraints can produce the effects condemned by the Sherman Act is no longer open to question." *Ibid.* See also *United States* v. *Employing Lathers Ass'n.*, 347 U.S. 198 (1954); *Local 167* v. *United States*, 291 U.S. 293 (1934); *Sandidge* v. *Rogers*, 256 F. 2d 269, 276 (7th Cir. 1958).

4. Appellants urge that the agreements in question to set market hours come within "the rule of reason", and are therefore not an unreasonable restraint of trade. *United States* v. *American Tobacco Co.*, 221 U.S. 106, 179 (1911). It is clear that a mere agreement to eliminate competition is not enough to condemn it, unless a *per se* violation. *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958); *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207, 212 (1959). A close and objective scrutiny of particular conditions and purposes is necessary in each case. *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360 (1933). Therefore, such a determination cannot be disposed of on a motion to dismiss, but must be properly aired in a trial where both parties have an opportunity to offer evidence as to facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual and probable; and the history of the restraint, *i.e.*, the evil believed to exist, the reason for adopting the particular remedy, and the purpose or end sought to be attained. *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918). It is sufficient to permit the matter to go to trail in that the complaint alleges the unreasonableness of the restraint.

5. Appellants next assert that plaintiff is without standing to sue because, as a party to the alleged illegal

agreement, it is *in pari delicto*. Appellants concede, however, that the *in pari delicto* defense does not apply where plaintiff's participation in the wrong alleged was induced by economic necessity, or where plaintiff's wrongful act is divorced from the illegal conspiracy, agreement or combination alleged in the complaint.

Appellants rely principally on *Lewis* v. *Quality Coal Corp.*, 270 F.2d 140 (7th Cir. 1959), where this court held that "the threat to cause a *legal* strike and its attendant work stoppage does not of itself constitute duress." (Emphasis supplied.) *Id.* at 143. Unlike the alleged illegal agreement here, the majority opinion there held that the contract in question was legal. When a business organization is the victim of an *illegal conspiracy* between certain of its competitors and a labor union to restrain trade, the business organization is not required to fight the matter out by economic warfare thus subjecting its employees who are not members of the offending union, its customers, and its stockholders, to the losses, inconvenience and damages of a strike, all for the purpose of shielding itself from the *in pari delicto* stigma.

In view of the factual situation which confronted plaintiff, the defense of *in pari delicto* is not available here. Private suits are merely a vehicle intended to further enforce the antitrust laws for the benefit of the real party in interest, the public. In the case at bar, the *in pari delicto* defense, therefore, cannot be allowed to thwart this congressional attempt to protect the public. The Supreme Court in *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211, 214 (1951) stated:

> If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured.

6. Appellants finally urge that plaintiff has suffered no injury to its business or property since the volume of goods purchased would remain relatively constant regardless of any change in marketing hours. However, plaintiff alleges in its complaint that the illegal conspiracy eliminates operating economies which are available to plaintiff through evening operation of its special refrigerated cases and other capital equipment, and proper utilization of labor. Thereby, the public has been denied the benefit of lower prices and plaintiff has suffered loss of profits. As this court held in *A. C. Becken Co. v. The Gemex Corp.*, 272 F. 2d 1 (7th Cir. 1959), where the fact of actual damages has been proven, mere speculation as to the amount of those damages will not defeat the plaintiff's right to recover. We hold that this complaint properly alleges facts, which, if proven, will establish the fact of actual damages.

For the reasons hereinbefore set forth the orders of the district court are affirmed and this cause is remanded for further proceedings not inconsistent with the views herein expressed.

AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS.

A true Copy:
Teste:

KENNETH J. CARRICK
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO 10, ILLINOIS

No. 12653

Monday, January 11, 1960

Before

Hon. F. RYAN DUFFY, Circuit Judge
Hon. ELMER J. SCHNACKENBERG, Circuit Judge
Hon. CASPER PLATT, District Judge

JEWEL TEA COMPANY, INC., a New York Corporation,
Plaintiff-Appellee,

v.

LOCAL UNIONS NOS. 189, 262, 320, 546, 547, 571 and 638, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the orders of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, with costs, and that this cause be, and it is hereby, REMANDED to the said District Court for further proceedings not inconsistent with the views expressed in the opinion of this Court filed this day.

APPENDIX C

1. The relevant provisions of the Sherman Antitrust Act (26 Stat. 209, as amended, 69 Stat. 282, 15 U.S.C. §§ 1, 2) are as follows:

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

2. The relevant provisions of the Clayton Act (38 Stat. 731, 737, 15 U.S.C. §§ 15, 26) are as follows:

Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Sec. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted

by courts of equity, under the rules governing such proceedings. . . .

3. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 316, 29 U.S.C. § 151 *et seq.*) are as follows:

Section 1. * * * The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

* * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring member-

ship in a labor organization as a condition of employment as authorized in section 8 (a) (3).

* * *

Sec. 8. (a). It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a). . . .

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

* * *

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in

respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

* * * *

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ."

4. The relevant provisions of Title II, Labor Management Relations Act, 1947 (61 Stat. 152, 29 U.S.C. § 171) are as follows:

Sec. 201. That it is the policy of the United States that—

* * * *

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes. . . .

* * * *

Sec. 204. (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements. . . .

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 732

LOCAL UNIONS NOS. 189, 262, 320, 546, 547, 571 AND 638, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL.,

Petitioners,

vs.

JEWEL TEA COMPANY, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW.

Correctly stated in the petition.

JURISDICTION.

Correctly stated in the petition.

QUESTION PRESENTED.

The question posed by the petition assumes the essence of the very contention petitioners seek to raise, namely that the National Labor Relations Board has authority to regulate the number of hours during which meat vending merchants may do business with the public. That assump-

tion is fantastically erroneous. We think no question of "primary jurisdiction", in the Labor Board is properly involved and are supported in that thought by the fact that although this case has been pending since July 29, 1958, the first time the phrase "primary jurisdiction" has been used is in the instant petition—an obvious last minute reaching for a phrase or concept that might induce the Court to grant certiorari and thus delay a trial.

We believe the actual question is:

> May a union combine with a trade association representing a substantial segment of the retail meat market operators in a large metropolitan area to control and limit the hours during which competitive market operators may offer meat for sale to the public?

Or, cast in the frame petitioners seek to use:

> Does the Labor Board have jurisdiction to exempt from the ban of antitrust laws a business-union conspiracy to limit the hours of competition in sales of meat to the public?

Specifically, the question centers on the following contract clause:

> "Market operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive. No customer shall be served who comes into the market before or after the hours set forth above. In those stores in which the grocery departments remain open after 6:00 p.m. only the following products may be sold after 6:00 p.m. [then follows a list of so-called 'delicatessen meats']" (R. 23, 38).

STATEMENT.

This case, at the election of petitioners, is presented on motion to dismiss the complaint. Although the petition seeks (p. 14) to explain or deny averments of the complaint, the facts remain (a) the complaint now stands as admitted, and (b) no final judgment has been entered. Petitioners will have opportunity on the trial to contradict, if they can, the complaint.

The complaint (R. 1 *et seq.* Par. references hereinafter are to the numbered paragraphs of the complaint) shows:

Plaintiff-respondent, Jewel Tea Company, Inc. (Jewel), operates some 196 retail food stores in the Chicago area. Its annual sales of meat exceed $5,000,000; total sales of foods, meats, toiletries, utensils, and other goods commonly sold in modern supermarkets approximated $285,000,000 in 1957.

Defendant Associated Food Retailers of Greater Chicago, Inc. (Associated) is a corporate trade association representing several thousand retail food stores which compete with Jewel. Associated's charter requires it "to seek, in every legitimate way, the advancement of its members, and with due regard of the public welfare, in every way to defend and preserve the principle of individual [apparently as distinguished from chain] merchandising." Its Secretary and Treasurer (Bromann) is also named a defendant.

The various other defendants, petitioners here (collectively referred to as "Amalgamated"), are local unions of Amalgamated Meat Cutters and Butcher Workmen of North America—AFL-CIO and their officers.

THE FUNDAMENTAL MISSTATEMENT AND NON-EXISTENT PREMISE OF THE PETITION.

The petition fails to inform the Court that the restriction on respondent's *market sales hours*, the subject of the suit, is treated in the labor contracts involved as a subject *entirely separate* from *hours of work by individual butchers*. The restriction prohibiting *sales* by respondent after 6:00 p.m. is a flat prohibition against dealing with the public and is set forth in self-contained "ARTICLE 5. MARKET OPERATING HOURS" (R. 23, 38).

Although the conspirators insist that respondent sell no meat after 6:00 p.m., *they are willing that butchers work after that hour. By wholly separate articles of the contracts*, "ARTICLE 4. WORKING HOURS AND OTHER CONDITIONS OF EMPLOYMENT" (R. 22, 37), they agree:

> "Overtime at overtime rates *may be worked behind locked doors from 8:00 a.m. to 9:00 a.m., after 6:00 p.m.*, and after eight (8) hours in any one day, *at the Employer's discretion.*"

The contracts thus mean that butchers are willing to, and do, work after 6:00 p.m. preparing and dressing meats until such hour as the employer believes proper, provided they are paid overtime. The contracts do not treat market operating hours either as "working hours" or as a "condition of employment."

From the foregoing it will be seen that such statements as the second sentence following, taken from page 10 of the petition, and around which the entire argument of the petition is constructed, are unpardonably contrary to fact:

> "(a) The complaint attacks as an antitrust violation the contractual requirement that retail marketing hours shall cease at 6:00 p.m. *The exact counterpart of this limitation is the contractual requirement that the workday shall cease at 6:00 p.m.*"

Articles 4 and 5 of the contracts are not counterparts and a butcher's workday need not cease at 6:00 p.m. Article 4 is a device to control the marketing of meat and to prevent Jewel from offering convenient hours of shopping as an element of competition. Articles 4 and 5, read together, impose a complete ban on sales to the public after 6:00 p.m. but impose no such ban on work by butchers; they give the market operator complete discretion as to the hours during which butchers will actually work.

The real purpose of the conspiracy is confessed in the following illuminating language at the foot of page 12 of the petition:

> "* * * to prevent loss of work by one type of market [service] to the other [self-service] based on differences in marketing hours, it is necessary that the marketing hours be kept the same in both types of stores."

THE "PRE-PACKAGED, SELF-SERVICE" SYSTEM OF VENDING MEAT AND LOWER PRICES

Modern methods of refrigeration and wrapping of meats permit an operator to have cuts of meat prepared in advance of sale. Such cuts are wrapped in sanitary transparent wrapping, marked as to weight and price, and are displayed in special refrigerated cases from which customers may remove the package, take it to the store cashier and purchase it. This system permits efficient utilization of the butchers' time by enabling them to prepare a supply of cuts free from interruptions arising from necessities of serving individual customers; the system offers operating economies that enable the market operator to sell at lower prices than are required in the so-called "service system" where the butcher waits for each individual customer to place an order and then prepares the desired cut (Par. 10). Under the "pre-packaged, self-service system" the butcher

need not be on duty in the store at the time the customer selects his desired cut and actually makes the purchase (Par. 11).

THE DEMAND FOR EVENING MARKET HOURS

Approximately 90% of Jewel's customers desire to be able to purchase fresh meats one or more evenings per week (Par. 12). In thousands of Chicago area households both husband and wife are employed, save for Saturdays, during the only hours (9:00 a.m. to 6:00 p.m.) during which defendants will permit Jewel to sell meat (Par. 12). Even in households where the wife is not employed, the hours dictated by Associated and its co-conspirators are often extremely inconvenient because the husband is using the family car so that it is not available for shopping (Par. 12).

Similar shopping and transportation conditions prevail in many of the metropolitan areas of the country and in most of them have led to the evening sale of meats through the "pre-packaged, self-service" system. In many such areas the butchers involved are members of other local unions of Amalgamated (Par. 13). As may be inferred from the provisions of the self-service contract, supermarket grocery departments have evening hours in the Chicago area but meat departments of the same stores are closed (R. 38).

Jewel has approximately 174 stores presently equipped for the "pre-packaged, self-service" system of vending meats. It would vend meats in all or most of them one or more evenings a week but for the conspiracy of the defendants (Par. 14).

THE CONSPIRACY.

For many years Associated, its co-conspirator members, and defendant Bromann, have conspired with one another and Amalgamated to prevent their competitors from selling fresh meat except between the hours of 9:00 a. m. to 6:00 p. m. Mondays through Saturdays (Par. 15). Associated has insisted that the unions act as the enforcing agent of the conspiracy by forcing *all* employers in this area to sign agreements that they will not sell fresh meat except during such hours (Pars. 16, 19). Defendant unions have entered into this conspiracy and advanced it by threatening to strike any employer who would not enter into, or who violated, these competition suppressing provisions (Pars. 19, 21, 22). The strike threat is a potent one because Amalgamated has a monopoly on the persons trained and fitted to cut meat in the Chicago area (Par. 4a).

Acting under the compulsion of the conspiracy, Jewel was forced to sign the restrictive agreements. From the outset of negotiations plaintiff protested that the restriction on its hours of operation was an illegal restraint of trade, but Associated refused to enter into any agreement permitting night openings and petitioner unions supported and abetted it in that refusal (Par. 20).

Amalgamated threatened to strike and picket plaintiff's stores. Plaintiff could not have operated its meat departments without the services of the numerous members of Amalgamated which it employs and such a strike would have inflicted great and severe damage upon it and have caused great public inconvenience because plaintiff not only would have been unable to sell meat but would have been unable to obtain delivery through the picket line of many perishable products such as bread, milk, etc. (Par. 21).

RESULT OF THE CONSPIRACY.

As found by the Court of Appeals, "the operation of this agreement has enabled Associated stores to remain closed after 6 P. M. without fear of losing trade to plaintiff, a major competitor, because of evening sales and also to avoid the added expense of remaining open during the evening" (Pet. p. 8a).

REASONS FOR DENIAL OF THE WRIT.

I.

The complaint shows a classic instance of a combination of labor unions with a non-labor group to control the marketing of goods, precisely the thing condemned in *Allen-Bradley Co. v. Local Union No. 3*, 325 U. S. 797, which held (p. 808):

> "* * * Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services."

The purpose of the instant control is to eliminate entirely convenience of shopping hours as an element of competition in the marketing of meats and to permit competitors to compete for sales only during specified hours. Or, as stated somewhat differently by the Court of Appeals, the purpose of the conspiracy is to protect the merchant who is unable or unwilling to offer evening shopping hours from a competitor (Jewel) which is willing to offer them and, by meeting the public need, diverting business to itself. The burden which this restriction places on the public becomes heavier each year: spreading suburban developments make the use of the family automobile outside of usual hours of factory or office employment almost a necessity for shopping. As the complaint shows,

Chicago is virtually the last, if not the last, metropolitan area in the country in which the public cannot buy meat in the evening.

Virtually identical combinations and restrictions limiting hours of competition in the retail sale of meat have been held illegal by the United States District Court for Minnesota, by state courts of California, and by a *nisi prius* court in Wisconsin under federal antitrust law or counterpart state law.

Red Owl Stores v. *Amalgamated Meat Cutters* (U. S. D. C., Minn.), 109 F. Supp. 629, involved a conspiracy much like the one at bar except that the employers there involved combined informally rather than through a formal trade association as here. The matter arose on opposing motions for a preliminary injunction and for summary judgment. The court held that neither form of preliminary or summary relief was proper, that the complaint stated a cause of action, and that the case should be decided only upon a full trial. It ruled as a matter of law (p. 634):

> "Respectable authority requires injunctive relief where the record discloses a combination between a union and business groups to restrain competition."

The California cases are *Kold Kist* v. *Amalgamated Meat Cutters*, 99 Cal. App. 2d 191, 221 P. 2d 724, and *Alpha Beta Food Markets* v. *Amalgamated Meat Cutters*, 147 Cal. App. 2d 343, 305 P. 2d 163.

In *Kold-Kist*, a manufacturer of frozen foods sued under the California antitrust laws to enjoin the unions and certain market operators from entering into agreements which would have prevented sale of frozen meats from self-service cases after 6:00 p. m. The court pointed out that the work hours of the butchers was not the subject of dispute and sustained the issuance of a preliminary injunction.

In the *Alpha Beta* case the ban was against the sale of pre-packaged frozen meat through self-service display cases at any time. The California court entered a declaratory judgment that such a prohibition was illegal under both the federal and state antitrust acts, relying, of course, in part on this Court's *Allen-Bradley* decision.

The Wisconsin *nisi prius* decision was under the Wisconsin state antitrust law. The case is *Demske* v. *Geroy*, 42 L. R. R. M. 2667.

It is difficult to believe that all of those courts, and the District Court and the Court of Appeals in the case at bar, were wrong, and that only learned counsel for Amalgamated are right. There is no case, so far as we are advised, and the petition cites none, that has ever upheld this type of competition suppressing restriction whether imposed by a union alone or by a union in combination with competitive business groups.

In short, as to the merits of the case, the petition does not cite any authority indicating probable error in the substantive decision reached; it is an illusive tour de force having the ultimate objective of overruling *Allen-Bradley* and suggesting that the place to start that overturn is in the Labor Board. However, assuming, *arguendo*, that the controversy was properly before the Labor Board, no case or statute is cited which would have warranted that tribunal (or its General Counsel) in arriving at a conclusion different from that of the District Court and the Court of Appeals.

II.

The complexly stated reasons in support of the petition's assertion that the Labor Board has primary jurisdiction of this controversy may be reduced to the following syllogism:

> A union, through Labor Board proceedings, can compel bargaining as to hours of employment.

> The hours during which a meat market is open for sales to the public are "related", or are "relevant" to the hours of work of employees in the market (p. 10).
>
> Therefore, restriction of the hours during which a merchant employer may compete for sales with other merchants is a subject "within the regulatory scope of the National Labor Relations Act," the antitrust laws to the contrary notwithstanding (p. 15).

To state that startling syllogism simply and accurately is to show its invalidity.

It is possible to argue that nearly anything that goes on in a business enterprise *affects* or has *relevancy* to hours, conditions of work or rates of pay, and therefore is within the jurisdiction of the Labor Board. It could be said that since the quantity and quality of advertising engaged in by a business affects the volume of work available for employees, unions, in combination with competitor businessmen, have a right to require the employer to limit, change or expand an advertising program; or to change the number, duties and the compensation of officers of the company; or to seek a bank loan or to float a bond issue for capital improvements; or to change the line of products dealt in or manufactured. Such examples show the scope and the basic unsoundness of Amalgamated's position. The Labor Act requires bargaining only on "wages, hours, and other terms and conditions *of employment*" (Sec. 8(d), *semble* Sec. 9(a), Pet. p. 15a). The words "*of employment*" are words of limitation. The Act does not require bargaining on matters other than those of employment regardless of the fact that such other matters ultimately may *affect* wages or hours.

The artful use, in the petition, of the phrase "the *regulatory scope* of the National Labor Relations Act" is an

invalid dialectic device of using the word "regulate" in a totally different sense from the sense heretofore used in connection with the "primary jurisdiction doctrine" in antitrust cases. "Regulated" (or "regulatory") has heretofore been used in such cases as a descriptive word indicating enterprises, usually utilities or common carriers, which are permitted to exercise a degree of monopoly, but whose rates and services are subject to control by an administrative agency. The Labor Act is not a "regulatory" act in that sense of the word at all.

The Labor Act does not "regulate" the food distribution industry, or any industry, *per se*. However, generically all law is regulation, and in that sense the Labor Act regulates phases of the employer-employee relationship just as the Fair Labor Standards Act regulates other phases thereof. (Note that in *International Association of Machinists* v. *Gonzales*, 356 U. S. 617, 630, the Chief Justice speaks of the Labor Act as "regulation of labor relations"—wholly accurate terminology having a connotation quite different from that of the petition).

The doctrine of primary jurisdiction in an administrative agency to determine permissible deviations from antitrust principles, has heretofore been, and in logic should be, applied, or seriously considered, only in "regulated" industries, as witness typical cases the titles of which bespeak the distinction we have suggested: *Keogh* v. *Chicago & N. W. Ry.*, 260 U. S. 156; *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474; *Georgia* v. *Pennsylvania R. R.*, 324 U. S. 439; *Federal Communication Commission* v. *RCA Communications*, 346 U. S. 86; *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481.

Professor Davis, (from whose text, brief phrases are quoted out of context in the petition) puts it as follows:

"In an unusually penetrating article, Mr. Robert B.

> von Mehren properly states the function of the primary jurisdiction doctrine in antitrust cases: 'All that it is designed to do and all that it properly does is to assure that the substantive exemptions from the antitrust laws created by Congress or required by the logic and structure of the regulatory scheme are not destroyed through by-passing the forum chiefly concerned with the regulation of the industry in question'" (3 Davis, *Administrative Law Treatise*, 38).

The sum of the matter here is: (1) The food distribution industry is the antithesis of a regulated industry. Competition has been enforced and the antitrust laws have been applied to it rigorously (*U. S.* v. *New York Great Atlantic & Pacific Tea Co.*, 173 F. 2d 79; *U. S.* v. *New York Great Atlantic & Pacific Tea Co.*, 137 F. 2d 459; *U. S.* v. *Safeway Stores, Inc.*, *U. S.* v. *Kroger Grocery & Baking Co.*, 144 F. 2d 824). (2) There is not a line in the National Labor Relations Act, as amended, or in the debates on the Wagner, Taft-Hartley, or Landrum-Griffin Acts indicating that Congress had the remotest intention by those Acts of relaxing antitrust prohibitions against business-union combinations in either "competitive" industries; or, insofar as they applied, in "regulated" industries, much less giving the Labor Board any discretion or authority in that regard.

Thus, the industry involved, retail distribution of food, is not a "regulated" industry, and the agency involved has no jurisdiction with respect to possible antitrust relaxation. Therefore the predicates for application of the primary jurisdiction doctrine, the "practical functions" it was designed to secure, are wholly lacking (Edward Douglass White, 257 U. S. xxv).

The Labor Board exists for two basic purposes: First, to define what are appropriate collective bargaining units and to conduct representation proceedings to determine whether the employees in such a unit desire a collective bargaining

agent, and, if so, what agent; second, to stop and to remedy specified unfair labor practices by employers or labor organizations.

The Labor Board has no authority to say that because a combination of businessmen and labor unions memorialize in a collectively bargained contract an agreement which is illegal under the antitrust laws, that the illegal agreement has become legal. Merely because the Board has jurisdiction to rule whether the parties have bargained in good faith, it does not follow that the Board has exclusive or even primary jurisdiction to decide whether the bargain is a lawful one. Moreover, with respect to the precise question here involved, it may be observed that the Board is wholly lacking in special competence, expertise, or jurisdiction, to explicate the antitrust laws.

There have been many problems under the Labor Act involving questions of federalism and pre-emption where the controversy involved either allegedly tortious conduct in abuse of the employer-employee relationship or the form or manner of remedy therefor. Typical cases are: *Garner* v. *Teamsters Union*, 346 U. S. 485; *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656; *Weber* v. *Anheuser-Busch*, 348 U. S. 468; *United Automobile etc. Workers* v. *Wisconsin Employment Relations Board*, 351 U. S. 266; *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1; *International Association of Machinists* v. *Gonzales*, 356 U. S. 617; *Automobile Workers* v. *Russell*, 356 U. S. 634. Central to those cases, and others like them, was the basic question of resolving rights or remedies as between employer and employee or the employees' organization. Whether the judicial rubric be "pre-emption" or "federalism," the fact is that the core of the controversies concerned subject matter committed to the Labor Board.

Detailed analysis of those and similar cases is unnecessary in the case at bar because they all go to a different

problem from that presented here, but to the extent they may be deemed material it should be noted that where state law provided a remedy of exemplary or punitive damages unavailable in Labor Board proceedings, as in *Laburnum* and *Russell*, *state jurisdiction has not been held pre-empted.* Here, we submit the Labor Board has no jurisdiction whatever to pass on antitrust cases, but aside from that it is also apparent that the Congressionally created antitrust remedy of treble damages and attorneys' fees is just as unavailable in Labor Board proceedings as were punitive damages in *Laburnum* and *Russell*. By parity of reasoning the conclusion would follow that this court action is maintainable even if it be assumed that there is a Labor Board remedy for part of the controversy.

Clearly different from the pre-emption cases we have just referred to is the line of cases involving alleged or actual antitrust violations, whether by unions alone or by business-union combinations as here. Such cases, regardless of outcome, have been treated as unquestionably calling for direct disposition by the courts. There are such cases as *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, and *United States* v. *Hutcheson*, 312 U. S. 219, finding that labor union conduct did not violate the Sherman Act (which indicate the dichotomy between things managerial and things labor about which the present petition would grieve), and other cases which were foretold by the following sentence in *Hutcheson* (p. 232):

> "So long as a union acts in its self interest and does not combine with non-labor groups, the licit and the illicit under § 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongfulness, the selfishness or unselfishness of the end of which the particular union activities are the means."

such as *Allen-Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797, heretofore discussed, *Columbia River Packers Associ-*

ation, Inc. v. *Hinton*, 315 U. S. 143, *Hawaiian Tuna Packers* v. *International Longshoremen*, 72 F. Supp. 562, *Gulf Coast Shrimpers, etc.* v. *United States*, 236 F. 2d 658, and *Anderson-Friberg, Inc.* v. *Clary & Son*, 98 F. Supp. 75, in which antitrust remedies were applied. In a recent case which touches on the subject peripherally through consideration of the relation of the Ohio antitrust law and the National Labor Relations Act, *Local 24 International Brotherhood of Teamsters* v. *Oliver*, 358 U. S. 283, this Court did not so much as intimate that the courts were not the initial proper forum and, although upholding the right to bargain collectively for wage scales and to protect them against undercutting, significantly said (p. 296), "Federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide." In the case at bar the limits set by the Federal antitrust laws clearly have been exceeded.

There are two other observations which we submit are pertinent:

(1) Not only is there not a line in the Labor Act indicating that Congress ever had any intention of committing any antitrust discretion to the Labor Board, but the further fact is that the *Allen-Bradley* decision was handed down in 1945. Since that time labor legislation has been a perennial topic of Congressional debate; the Act was radically amended in 1947 and in 1959; less important amendments were made in 1950. If *Allen-Bradley* was wrong, there has been ample time since 1945 for Congress to have corrected it.

(2) The unique internal structure of the agency, with its division of responsibilities between the General Counsel and the members of the Board is quite different from that of the Interstate Commerce Commission and other agencies that have been recipients of primary jurisdiction In the other agencies the parties can be remitted to the agency and

a hearing by it, whatever the ultimate result may be, is assured. But here, Jewel could be remitted *only to the General Counsel of the Board, not to the Board itself* (Sec. 3(d), App. hereto).

The General Counsel might exercise his discretion not to issue a complaint, in which event there would be no hearing by the Board whatsoever—nor any appeal to it. But even if a complaint was issued, Jewel could not prosecute its own case; its rights would be limited by such presentation as the General Counsel saw fit to make. For the foregoing procedural reasons, peculiar to the Labor Board, it will be seen that the usual primary jurisdiction benefits of assured agency action on the parties' contentions would be absent even if it be assumed that the Labor Board had power to relax the antitrust laws. It would be grossly inconsistent with sound antitrust policy to hold that a private party, wronged by an antitrust violation and entitled to treble damages, and perhaps to injunctive relief, had to submit his case to such a devitalizing, time-consuming and fruitless procedure.

III.

We submit the foregoing demonstrates that certiorari should not be granted. However, the petition is replete with misstatements of fact contrary to, or not inferable from the complaint by which petitioners seek to color their argument. These should be corrected:

The most outstanding is the one repeated in various forms in the petition, and already noticed, to the effect that the butchers do not wish to work after 6:00 p.m. But the complaint shows that by their contracts the butchers say they are perfectly willing to work evenings whenever, in the employer's discretion, they should, so long as they are paid at overtime rates. What should be paid butchers for work after 6:00 p.m. is not in issue. The simple fact is that the

butchers are willing, in Chicago as elsewhere, to work evenings—but, *in combination with Associated, they are not willing that their employers compete with each other by dealing with the public in the evening.*

Again, the petition asserts that Jewel would satisfy the "butchers' [non-existent] wish" not to work after 6:00 p.m. by taking work away from them. However, what paragraph 11 of the complaint (R. 7) actually shows is that after the preparation of the packaged meat it is not necessary for butchers to be on duty at all hours at which meats are actually purchased under the self-service system because "the incidental tasks of arranging the cuts in the cases and cleaning the cases need not be performed continuously throughout store hours and can be performed by others *or can be performed by butchers some hours prior to the ending of store hours.*" By stating the foregoing alternatives, respondent does not seek to take work away from butchers under the self-service contract which recognizes petitioner unions as exclusive bargaining agents for a unit of "all employees in the meat department * * * who process, pack, wrap, handle and sell frozen and fresh meats" (R. 33).

Cleaning the display cases is mere housekeeping, and the contract is silent as to who should do it.

Certainly arranging ("stocking") the packaged cuts of meat within the display cases could be held to be "handling" meats, although such construction is by no means required. But whatever the construction of "handling" may be, the complaint neither admits nor asserts that respondent would take this simple task away from butchers, because the complaint alleges that if a butcher's hours of work should end at 6:00 p.m., while the market stays open until 9:00 p.m., the butcher could perform this menial service before he left. This is precisely what is now done with respect to stocking the self-service case with delicates-

sen and allied meat products that respondent is permitted to sell after 6:00 p.m. (See Art. 2, Sec. 3, Self-Service Contract, R. 33).

With respect to "selling" in self-service markets, butchers, in a legal sense, never "sell." The "sale" is not actually made until the customer has selected his cut and carried it to the store cashier, who notes the price and collects the money. Cashiers are not members of the "meat department" and therefore are not in Amalgamated's bargaining units. Petitioners have not objected to the making of sales by the cashiers. Therefore, neither from strict legal construction of the contract nor from the practical construction the parties already have placed on it, would mere extension of market hours in self-service stores in any way change the practice with respect to "selling."

Again, the petition asserts that respondent seeks to increase the "work-load" on individual butchers either through increasing the volume of business in a store or by lengthening the hours of employment, but there is not a line of the complaint that may fairly be construed to show the "work load" of any individual butcher would be increased. On the contrary, it is a matter of common knowledge that employers generally maintain a fairly constant work load per employee by expanding or contracting the size of their working forces or increasing or staggering shifts as business expands or contracts.

IV.

If certiorari were granted, it could only be upon the supposition that perhaps Congress intended, or that perhaps the sound administration of justice required, that whenever a person believes he has been injured in his business or property through an antitrust violation by a combination of businessmen and labor organizations, he must

submit his case to the Labor Board before proceeding with the Congressionally created and socially desirable treble damage action. No grounds of policy or of decisional law are shown for the possible validity of so unusual and inventive a supposition.

The Court has sufficient problems presented to it that are of a real and substantial nature without granting certiorari to explore what must in final analysis amount to a contention that labor unions and businessmen can enter into agreements to suppress competition, and that the Labor Board is the proper forum to decide initially to what degree they may do so. This is particularly true in a case where the practical result sought to be achieved is to continue in the Chicago area an abusive trade practice which has been abandoned elsewhere throughout the nation.

CONCLUSION.

For the reasons stated the instant petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated March 10, 1960.

APPENDIX.

1. A relevant provision of the National Labor Relations Act, as amended (61 Stat. 319(d), 29 U.S.C. § 153(d)) not quoted in the petition is as follows:

> "Sec. 3(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law."

FILE COPY

No. 732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

LOCAL UNIONS NOS. 189, 262, 320, 546, 547, 571 and 638, AMALGAMATED MEAT CUTTERS and BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL., *Petitioners,*

v.

JEWEL TEA COMPANY, INC., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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1. In an attempt to show that the National Labor Relations Act is not applicable to this controversy, respondent asserts that the limitation upon evening marketing hours is not relevant to the butchers' wish not to work evenings. For this purpose, respondent relies upon the overtime provision of the collective bargaining agreements (Opp. pp. 4, 17-18). The overtime provision states that (R. 22-23, 37):

> Overtime may be worked *behind locked doors* at overtime rates from 8:00 a.m. to 9:00 a.m., after 6:00 p.m., and after eight (8) hours in any one day, at the Employer's discretion. [Emphasis supplied.]

Respondent urges that the contractual authorization of the performance of overtime work "at the Employer's discretion" shows that the butchers have no objection to working evenings. Respondent misconceives the function of the clause. It overlooks the contractual requirement that overtime may be worked "behind locked doors" only. The "behind locked doors" requirement constitutes explicit recognition that overtime may be worked before 9:00 a.m. or after 6:00 p.m. only if the market remains closed during those hours. There is no commitment to work after 6:00 p.m. if the market remains open after 6:00 p.m. On the contrary, the agreement specifically negates any such commitment.

Once it is understood that overtime may be worked after 6:00 p.m. "behind locked doors" only, and not in conjunction with marketing hours after 6:00 p.m., the reason for this very limited authorization to work overtime is clear. Overtime is authorized to meet such special and emergent situations as the late arrival of a shipment of meat, a special sale requiring greater cutting in preparation for it, the opening of a new store, or shortness of help during periods of vacation relief. The unimportant incidence of overtime is illustrated by that provision of the self-service contract which states that (R. 36):

> There shall be no clean-up time after 6:00 p.m., except clean-up may be performed after 6:00 p.m. provided that overtime is paid for all work performed after 6:00 p.m.

Overtime is therefore permitted to meet the needs of marketing between 9:00 a.m. and 6:00 p.m., not before or after those hours. It is obvious that, in the absence of marketing hours after 6:00 p.m., the cir-

cumstances when it would be necessary to work after 6:00 p.m. would be small indeed, and hence allowance of overtime to meet these exceptional circumstances does not represent any significant inroad into the usual 6:00 p.m. stopping time. It is only enlargement of marketing hours after 6:00 p.m. which would seriously impair the butchers' wish not to work after that hour. It is that which would make working after 6:00 p.m. a routine affair rather than an unusual circumstance. Respondent can hardly draw from the authorization of overtime work in extremely limited circumstances the conclusion that butchers have no objection to working overtime generally.

Indeed, despite its protestations that hours of work are not at the heart of the controversy, respondent's complaint recognizes that the petitioner unions' objection is that evening marketing hours would interfere with the wish of the butchers not to work evenings, for it attempts unsuccessfully to show that the two are not incompatible. Thus, paragraph 11 of the complaint alleges that (R. 7):

> Plaintiff respectfully shows that under the "prepackaged, self service" system of vending meat a butcher *need not be on duty in the store* at the time the customer selects his or her desired cut of meat and actually makes the purchase; that the packaged cuts of meat can be, and are, safely and properly stored, displayed and made available for customer selection and self-service in refrigerated condition so that *there is no necessity for members of the defendant unions being on duty in plaintiff's stores at all hours* at which meats are actually purchased by the customers; that the incidental tasks of arranging the cuts in the cases and cleaning the cases *need not be performed continuously throughout store hours and can be*

performed by others or can be performed by butchers some hours prior to the ending of store hours. [Emphasis supplied.]

The emphasized parts of the allegation are pointless except to overcome the objection that evening marketing hours do require evening working hours. We have outlined the reasons which show that this allegation fails to overcome the objection (Pet. pp. 10-14), and since it fails, there is no escape from the conclusion that the issue of working hours is fundamental to this controversy.

Finally, if, as respondent would have it, it may sell meat after 6:00 p.m. and butchers are obligated to work after 6:00 p.m. at its discretion, this conclusively demonstrates the relationship of marketing hours to working hours. For, under its view, ~~petitioner~~ respondent would be authorized to require butchers to work nights in order to provide the meat to sell at night. The position is therefore incontestable, we believe, that working hours and marketing hours do march abreast of each other. One cannot be increased without increasing the other.

2. We have dwelled upon this matter because it illustrates the lengths to which it is necessary to go in order to avoid the applicability of the doctrine of primary jurisdiction. For the essence of respondent's position, as it was of the decision below, is that "it can hardly be argued" that the contractual regulation of marketing hours serves to safeguard the unions' interest in limiting working hours (Pet. p. 7a). This means not only that a collective bargaining relationship between the two is not fairly arguable on the face of the complaint and the contracts annexed to it, but also that it is not reasonably foreseeable that a trial

would produce a set of facts placing the subject within the realm of fair argument. For however "bad" a complaint may paint an agreement, "it may turn out upon investigation that the allegations are not warranted, or the facts and circumstances of and surrounding the transaction are so wholly different as to afford ground for a different result." *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474, 487-488. And so the court below was forced to the position that no set of circumstances is reasonably conceivable which would call into play the Board's competence to decide initially whether marketing hours is a mandatory subject of collective bargaining. It not only bypassed the Board, but to justify that course, it compounded its error by apparently foreclosing inquiry into this subject upon a trial before the District Court itself; for it could not consistently say that "it can hardly be argued" that marketing hours is a mandatory subject of collective bargaining and at the same time remit the unarguable to the District Court for argument. And so the logic of the position of the court below seemingly brought it to the conclusion that the question whether marketing hours is a mandatory subject of collective bargaining is closed to plenary inquiry before any tribunal. Yet it is obvious that either the Board or the District Court must be open. It is important that this Court decide which of the two is the proper forum. And equally important is the companion question of how much must be determinable from the complaint before initial decision is committed to the Board.

3. Respondent contends that the doctrine of primary jurisdiction is not applicable because retail distribution of food is not a "regulated" industry (Opp. pp.

11-13). It is of course true that a food retailer is not regulated in the same sense as is a carrier. But the point of regulation relevant to primary jurisdiction is that judicial action is sought upon a subject which implicates a statutory standard of conduct administered by an agency. *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 63-65. What is pertinent is that the subject is regulated; it does not matter that as to unrelated subjects the industry is unregulated. And it can hardly be doubted that in this relevant sense the National Labor Relations Act regulates. This Court has referred to "the multitude of activities *regulated* by §§ 7 and 8 of the National Labor Relations Act"; it spoke of this as the "area of *regulation*"; it observed that "Administration is more than a means of *regulation*; administration is *regulation*"; it described the covered activities as "the subject of national *regulation*"; and it concluded that the "governing consideration is that to allow the States to control activities subject to federal *regulation* involves too great a danger of conflict with national labor policy." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 241, 243, 244, 246 (emphasis supplied). Whether regulation by the National Labor Relations Act which excludes state action also requires application of the doctrine of primary jurisdiction is a question this Court should decide.

4. Respondent asserts that the doctrine of primary jurisdiction should not apply because the "General Counsel might exercise his discretion not to issue a complaint . . ." (Opp. p. 17). This was a facet of the regulatory scheme, described by this Court as a "narrow area," which had not escaped this Court's attention in concluding that state action was preempted

(*San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245-246):

> . . . the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance.

Whether this "narrow area," irrelevant to preemption of state action) should be enough to avoid the applicability of the doctrine of primary jurisdiction, is a question which emphasizes the appropriateness of review by this Court. Only this Court can authoritatively say whether a material difference exists. We do not probe the merits, for that is not the function of a petition. Enough has been shown, we believe, to demonstrate that the court below "has decided an important question of federal law which has not been, but should be, settled by this court. . . ." Rule 19(1)(b), Revised Rules of the Supreme Court of the United States.

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